specifically disclaimed the use of further adjudication, the Commission abused its discretion by abruptly and without notice changing to an adjudication.[66/]

The Commission proffers no reasoned basis for ignoring the fact that it initiated a rulemaking and for its bald contention that the classification decision is an adjudication. In fact, the Commission does not even acknowledge that it initiated a rulemaking. It treats its notice of proposed rulemaking as having no more significance than had it simply sought public comment on AT&T's declaratory ruling request through issuing a public notice.[67/] That is not what the Commission did, however. It did not simply solicit further public comment on AT&T's declaratory ruling, it instead initiated a rulemaking to decide the classification. Along the same vein, the Commission claims that it was simply concluding the adjudication begun by AT&T's request for a declaratory ruling on IP-Calling Cards and Menu Driven Cards, ignoring that it had interposed its rulemaking to address that issue and specifically eschewed further "piecemeal" adjudication via AT&T's requested declaratory ruling.[68/]

The Commission cites no exigency that would have required it to put aside its rulemaking to address through adjudication a new controversy or circumstance presented to it. The Commission merely cites to the same adjudication that it had before it when it initiated the rulemaking. The Commission could have adjudicated the classification of IP-based calling cards

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66/ *See Hercules Inc. v. EPA,* 598 F.2d 91, 119 (D.C. Cir. 1978) (noting that the EPA explicitly chose to proceed through a formal rulemaking process and thus acquiesced to the standard of review appropriate to formal rulemakings); *Dow Chemical, USA v. CPSC,* 464 F. Supp. 904, 908 (D. La. 1979) (noting that, while agencies have discretion to proceed via adjudication or rulemaking, "[w]hen an agency, as here, chooses the rulemaking alternative," it must comply with APA rulemaking requirements).

67/ *Calling Card Order* ¶ 44.

68/ *Id.*

at that time but it found the "public interest would be better served" by addressing the question in a rulemaking. If the Commission had changed its mind during the course of the rulemaking proceeding and determined to address the classification question as an adjudication after all, it should have provided notice to that effect.

None of the authority cited by the Commission remotely supports its view that the issuance of the NPRM and the initiation of the rulemaking had no effect on the "adjudicatory nature" of the proceeding or that the proceeding had not been converted it into a rulemaking.[69/] The Commission first cites an ex parte submission purporting to show that the issuance of an NPRM does not preclude retroactivity.[70/] But that ex parte submission treats the proceeding as a rulemaking and then blatantly misstates the law by claiming there is no bar to adopting retroactive rules in a rulemaking.[71/] The submission cites for this erroneous statement of the law one case involving retroactivity in an adjudication,[72/] which is beside the point, and another case

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69/ *Id.* ¶ 44, and n. 115. It is wholly unclear what the Commission intended by its reference to the "adjudicatory nature" of its classification decisions. Other than the fact that there was at one time a request for a declaratory ruling, the Commission points to nothing to support its contention that the proceeding was adjudicatory in nature. In fact, quite the opposite, as noted above, the proceeding had all of the hallmarks of a rulemaking and the classification decision has broad, general prospective effect as well as, with respect to IP-Calling cards, retroactive effect.

70/ *Calling Card Order* n. 115.

71/ *See, e.g.*, Letter from Vonya B. McCann, Vice President, Government Affairs, Sprint Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-68 (Apr. 18, 2006) ("The fact that these cards are being considered in the context of a rulemaking, rather than a declaratory ruling, does not require the Commission to limit its ruling to prospective application").

72/ *Id.* at 2 (citing *Public Service Co. of Colorado v. FERC,* 91 F.3d 1478, 1489 (D.C. Cir. 1996).

involving an interpretive rulemaking (which does not require the issuance of an NPRM).[73/] The bar on retroactive rulemakings, however, fully applies to interpretive rules.[74/]

The Commission's citation to *Viacom Int'l v. FCC* is equally unavailing.[75/] That case simply stands for the unremarkable proposition that agencies can choose between rulemaking or adjudication in the first instance, a general proposition with which iBasis has no quarrel.[76/] *Viacom* does point out, however, that an agency's choice may not prejudice a party.[77/] Here, on the other hand, the Commission's adjudicatory characterization causes immense prejudice because it exposes providers to retroactive liability for, *inter alia*, substantial back payments to the federal universal service fund.

Finally, the Commission includes a puzzling citation to *North American Telecommunications Association*.[78/] But that case states that the Commission can use declaratory rulings to issue interpretive rulings, and that declaratory rulings are not limited to

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73/ *Id.* (citing *Farmers Telephone Co., Inc v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999).

74/ *Shalala*, 23 F.3d at 423 ("We agree with the government's implicit concession that interpretive rules, no less than legislative rules, are subject to *Georgetown Hospital's* ban on retroactivity").

75/ *Calling Card Order* n. 115; *Viacom Int'l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982)("*Viacom Int'l*") (noting parties "did not sustain any prejudice from the FCC's proceeding" in the way it did).

76/ For the same reason, the Commission's citation to *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), adds nothing to the mix as that case reiterates the general proposition that the choice is up the agency in the first instance.

77/ *Viacom Int'l*, 672 F.2d at 1042.

78/ *Calling Card Order* n. 115 (citing *North American Telecommunications Association*, ENF File No. 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 ¶¶ 1, 54 (1985)).

adjudications.[79/] The case thus undermines the Commission's premise that declaratory rulings are by their nature adjudicatory.[80/]

In short, the Commission proceeding properly constituted a rulemaking. The imposition of retroactive liability is thus unlawful.

### B. *Imposition of Retroactive Liability Would be Impermissible Even if the Calling Card Order is an Adjudication*

Even assuming, for the sake of argument, that the proceeding is an adjudication and that the issuance of the *EPCC NPRM* and the Commission's statements did not transform the proceeding into a rulemaking, retroactive application against iBasis would still be improper. This is an issue of first impression, not suitable for retroactive treatment. But even if it is new application of existing law, as the Commission claims, the issuance of the NPRM and the statements made therein make it manifestly unjust to impose retroactive liability.

A critical question in determining the appropriateness of retroactivity is whether the decision creates a new rule "because it was an issue of first impression."[81/] The provision of services using Internet technology, such as VoIP, has confronted the FCC with difficult and complicated questions of regulatory classification and jurisdiction. It has only recently begun to issue rulings on some of these services and had issued no ruling on IP-enabled calling card services until this Order. The Commission initiate a rulemaking to address for the first time the classification of IP enabled and other "enhanced" calling cards because such services were not

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79/ *North American Telecommunications Association*, at n. 9.

80/ *Calling Card Order* ¶ 41 (declaratory rulings are a form of adjudication)

81/ *United Food and Commercial Workers v. NLRB,* 1 F.3d 24, 35 (D.C. Cir. 1993).

currently addressed by its rules. This was thus an issue of first impression and should not have been retroactively applied.

Even assuming that it was a new application of existing law, as the Commission, claims, retroactivity is not allowed where it results in unfair on inequitable treatment. As noted by the Commission, the D.C. Circuit has established a multi-factor test in assessing the propriety of retroactivity that is grounded in "notions of fairness and equity."[82/] An important, but not decisive factor, is whether previous agency pronouncements reasonably placed the party on notice that it might be subject to retroactive treatment.[83/] Courts decline to enforce retroactivity decisions when "the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests."[84/] Application of this standard renders the imposition of retroactivity on iBasis unreasonable.

The Commission's determination that IP-Calling Cards are a telecommunications service is based on the Commission's analysis in the *AT&T IP-in-the-Middle Access Charge Order*. In that order, the Commission found that AT&T's use of IP technology to transport its standard 1+ dialed long distance service did not convert that it telecommunications services into an information service. The Commission found that "an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP

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82/ *Calling Card Order* ¶ 42 (citing *Clark Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)).

83/ *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001).

84/ *Retail Wholesale Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

technology' is a telecommunications service."[85/] The Commission found that calling card services that use IP transport and meet these same criteria but access the network through dialing an 8YY number, rather than 1+ dialing, are also telecommunications services. It concluded that that it was fair to make this classification retroactive because the *AT&T IP-in-the-Middle Access Charge Order* provided "ample notice that merely converting a calling card to IP format and back does not transform the service from a telecommunications services to an information service and consequently, it undermines any alleged reliance by prepaid card providers on any contrary interpretation of our rules."[86/]

The Commission's reasoning is flawed. It should be noted at the outset that the *AT&T IP-in-the-Middle Access Charge Order* had nothing to do with calling cards, and that the Commission took great pains in that order to limit the effect of the decision to the specific service at issue.[87/] Notably, the Commission also refused to engage in any determination of retroactivity in the *AT&T IP-in-the-Middle Access Charge Order*, despite specific requests to do so.[88] The Commission there concluded that the determination to impose access charges retroactively was too fact specific for resolution in that proceeding. The Commission proffers no explanation as to why it believed the equitable analysis required for retroactivity was unsuitable

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85/ *Calling Card Order* ¶ 19 (quoting *AT&T IP-in-the-Middle Access Charge Order* at ¶ 1).

86/ *Id.* ¶ 43.

87/ *AT&T IP-in-the-Middle Access Charge Order* ¶¶ 2, 10, 12, 14, 22.

88 *Id.* ("While we recognize the strong interest in providing certainty – and indeed that is a primary reason for issuing this ruling – we are unable to make a blanket determination regarding the equities of permitting retroactive liability. We believe that the equitable inquiry is inherently fact-specific.").

for resolution in the *AT&T IP-in-the-Middle Access Charge Order*, but appropriate in the instant order.

At any rate, any alleged notice given by the *AT&T IP-in-the-Middle Access Charge Order* to calling card providers was wholly vitiated by the Commission's intervening *EPCC Order and NPRM*.[89/] This is because the NPRM specifically asked "[a]re prepaid calling card services that use *IP-in-the-Middle* and meet [that order's three] criteria also telecommunications services?"[90/] Thus, not only did the *EPCC Order and NPRM* put the industry on notice that the classification question was still open, it informed the industry that, by addressing the question in the newly initiated rulemaking rather than the then-pending adjudication, the question would be answered on a prospective basis only. In other words, the NPRM itself put the industry on notice that the classification question would only have prospective effect.

As was noted above, the issuance of the *EPCC Order and NPRM* had exactly this effect on iBasis. iBasis had determined to make voluntary USF contributions on its wholesale business in the wake of the *AT&T IP-in-the-Middle Access Charge Order* despite its firm conviction that its services were, as set forth above, distinguishable from AT&T's services at issue there and were, in fact, information services. It came to a different conclusion regarding its IP-transported calling card services because the Commission had initiated the rulemaking to decide the classification of that service.[91/] Imposition of retroactive liability on iBasis is thus inequitable.

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89/ That Order also did not address IP-transported calling card services or IP services in general. The Order specifically noted that the Commission might reach a different conclusion when it resolved the pending IP-enabled rulemaking.

90/ *EPCC Order and NPRM* ¶ 40.

91/ Draluck Decl. ¶ 13-15.

iBasis reasonably relied on the Commission's clear statements in the NPRM that it would not address the issue as part of an adjudication, but rather in a rulemaking. [92/]

Moreover, the Commission completely ignored the burden that its retroactive decision will have on iBasis and other entities that might be affected. As part of its decision to deny retroactive treatment for the largest carriers like AT&T and Verizon that provide Menu Driven cards, the Commission specifically pointed to the burden that retroactivity would impose.[93/] The Commission pointed to fact that the telecommunications services designation subjects them to "access charges, Universal Service Fund contribution obligations, and the full panoply of Title II obligations."[94/] The Commission acknowledged these very same burdens would also be imposed on IP-transit calling card providers, but claimed that burden is "not decisive" given its finding that such providers had "ample notice" from the *AT&T IP-in-the-Middle Access Charge Order*.[95/] But the Commission is not free to ignore this burden just because it claims a lack of detrimental reliance. Burden is an inherent part of the any reasonable "notion of equity and fairness" and a separate and stand-alone factor identified by the D.C. Circuit.[96/] Yet the Commission simply dismissed the burden factor without making any assessment of the extent of

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92/ It was certainly reasonable to rely on the Commission's pronouncements in an NPRM. The Commission recognized in the *AT&T IP-in-the-Middle Access Charge Order* that statements in the *Intercarrier NPRM* that access charges do not apply to VoIP services bear on the fairness of retroactive treatment. *AT&T IP-in-the-Middle Access Charge Order*, ¶ 20-22.

93/ *Calling Card Order* ¶ 45.

94/ *Id.*

95/ *Id.* n. 120.

96/ *Id.* ¶ 42 (citing *Clark-Cowlitz*, at 1082 n.6); *see also*, *Verizon Telephone Cos. v. FCC*, at 1099.

this burden or the hardship retroactivity might cause the much smaller carriers that may be swept up in the Commission's retroactivity finding.

Nor is there any "sufficiently countervailing statutory interest" to offset the ill effects of imposing retroactive liability. Certainly the Commission points to none. Whatever interest the Commission may have in shoring up the universal service fund and promoting stability in the calling card market,[97/] is fully addressed in that part of the *Calling Card Order* that imposes -- on a *prospective* basis only -- interim USF contribution and access charge related reporting requirements on *all* prepaid calling card providers.[98/] Moreover, although the Commission also found that Menu Driven Cards were telecommunications services, it did not impose retroactive liability on those types of cards, which are offered by the largest carriers, such as AT&T and Verizon. Neither AT&T nor Verizon utilize IP transport.[99/]

By limiting retroactive liability only to IP-Calling Cards, the Commission has created a profoundly uneven playing field that takes the largest carriers off the hook while imposing the burden of retroactive liability on a handful of niche players least able to carry that burden.[100/] Indeed, coupled with the Commission's recent decision to impose USF contribution

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97/ *Calling Card Order* ¶ 1.

98/ *Id.* ¶ 21.

99/ As noted elsewhere, AT&T informed the Commission that it did not provide IP-Calling Card services. *See,* note 36 *supra*. Thus, the party that brought the litigation effectively dropped out with respect to one type of service that received retroactive treatment.

100/ iBasis is unaware of any other carriers that might be subject to the Order's retroactive finding.

requirements on so-called interconnected VoIP providers *prospectively,*[101/] iBasis may be the only VoIP provider saddled with a retroactive USF liability -- and all arising from a litigation to which it was not party.

## V. The Balance of Harms and Public Interest Support a Stay

### A. *Irreparable Harm*

iBasis will suffer irreparable harm in the absence of a stay. The Order will require iBasis to make a substantial, in terms of impact on iBasis, payment to the federal USF fund. In the absence of a stay, there is a substantial risk the iBasis would not recover those amounts in full following a successful appeal. A risk of unrecoverable loss constitutes irreparable harm.[102/]

iBasis estimates that it may have to make a USF contribution in excess of $2.5 million as a result of the Order's imposition of retroactive liability.[103/] This amount is substantial for iBasis, as it exceeds the entire profit that iBasis has earned in the past year.[104/]

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101/ *Report and Order and Notice of Proposed Rulemaking,* FCC 06-94, 38 CR 1013, *Universal Service Contribution Methodology, Report and Order* ("*USF Contribution Order*") *and Notice of Proposed Rulemaking* ("*Notice*") (rel. June 27, 2006).

102/ *See, Edelman v. Jordan,* 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., in chambers) (granting stay where movant unlikely to recover funds paid out if successful on appeal); *see also, American Hosp. Supply Corp. v. Hospital Products Ltd.* 780 F.2d 589, 594, 596 (7th Cir. 1986) (risk that complete recovery will not be possible creates irreparable injury). Moreover, because the USF payment is for prior periods, iBasis will have no way of recovering those charges from its customer base, which is the norm in the industry.

103/ Draluck Decl. ¶ 16. The *AT&T IP-in-the-Middle Access Charge Order* does not specify any timetable or procedure for making the USF back payment, nor does it specify the period of time the back payment might cover. The order, however, becomes effective October 31, 2006 (90 days following publication in the Federal Register, which occurred on August 2, 2006). *See* 71 FR 43667. Thus, the retroactive obligation will arise at that time. Because the *Calling Card Order* also identifies the *AT&T IP-in-the-Middle Access Charge Order* as having provided notice of possible telecommunications services designation, and without conceding that the date of that

There is no assurance that iBasis will recoup these payments should it prevail in its appeal -- an outcome that must be assumed in evaluating irreparable harm. Although the Commission's rules make some provision for a limited refund, the terms of those rules will allow iBasis only a fraction of the amount it will have paid. The Commission will treat iBasis's non-payment of universal service charges as an understatement of actual telecommunications revenues. When issuing its bill, the Universal Service Administrative Company ("USAC"), the entity that administers the USF, will determine the underpayment by multiplying iBasis's calling card revenue by the average of the two *highest* Commission-approved quarterly universal service fund contribution factors for that year.[105/] In contrast, if iBasis prevails on appeal, and USAC determines to provide a refund, the Commission's stated procedure indicates that USAC would calculate refunds of overpayments based on the average of the two *lowest* universal fund contribution factors for the reporting period.[106/] Thus, under the Commission's procedures, iBasis would not recover the full amount of its payment, nor would it receive interest on the amount that it had paid.

The *Calling Card Order*'s retroactive application does far more than impose a retroactive USF payment obligation. The effect of the *Order* is to have iBasis' prepaid calling card service retroactively designated as a telecommunications service for some unspecified, but substantial, period of time. The *Calling Card Order* thus retroactively exposes iBasis's calling card service

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order would be an appropriate starting point for back payments, iBasis has calculated its USF contribution back payment from that point.

104/ Draluck Decl. ¶ 16.

105/ *Interim USF Contribution Order*, 17 FCC Rcd. 24,952, ¶36 (2002); *Quarterly Reporting Order*, 16 FCC Rcd. 5748, ¶12 (2001).

106/ *See id.*

to the full panoply of federal regulation under Title II of the Communications Act, as well as to the potential for retroactive state licensing or related filing requirements for intrastate traffic, all during a time when iBasis reasonably treated its service as an unregulated information service.[107/] Among other effects, this retroactive telecommunications services designation exposes iBasis to the risk and attendant cost of litigation from local exchange carriers to collect interstate or intrastate access charges, as well as the cost of assessing and, as necessary, rectifying, compliance with state and federal rules and regulations applicable to intrastate or interstate telecommunications services over the past two plus years. This too constitutes irreparable injury.[108/]

**B. *A Stay Will Not Harm Any Other Parties***

Staying the retroactive portion of the Commission's order will not result in harm to the federal USF or to private parties that have contributed to the fund. The universal service fund has suffered no shortfalls as a result of iBasis's reasonable determination that its IP Calling Cards were not subject to contributions requirements.[109/] To be sure, there is an argument that individual carriers' past contributions might have been smaller had iBasis contributed based on

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107/ The *Calling Card Order* fully recognizes the significance of these burdens. *Calling Card Order* ¶ 45.

108/ *See National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (irreparable harm found because plaintiff would incur substantial expense by the application of regulations that might be found to be invalid).

109/ The FCC requires carriers to contribute to the USF based on a percentage of their interstate telecommunications service revenues. 47 C.F.R. § 54.709. This percentage, or contribution factor, is based on a ratio of the quarterly expenses of the fund and the revenues of participating carriers. *Id.* The FCC reviews is USF expenses each quarter and recalculates the contribution factor to ensure that carriers will contribute enough to cover the Fund's quarterly expenses. *Id.* Accordingly, the USF has been fully funded in the past.

its domestic, interstate prepaid calling card revenues.[110/] But such carriers will be made whole if and when iBasis is required to make its payment, which will then reduce all other carriers' contributions. Other contributors have no great interest is receiving this reduction now as opposed to later should the court uphold the Commission's retroactive finding.

Moreover, while the amount of back payment is substantial for iBasis, it is insignificant for the overall universal service fund. The USF is currently a $7.3 billion program[111/] with 2,500 contributors.[112/] The $2.5 million that iBasis would be required to contribute should it lose its appeal is wholly *de minimis* in light of the overall size of the program. In the past, the Commission has argued that the equitable basis for requiring the payment of past shortfalls is that other contributors will receive a reduction in their future contributions concomitant with the size of the past shortfall when it is paid. This inures both to benefit of those contributors and to their customers to whom the reduced contributions are passed-through. In this case, however, the amount of such a reduction is inconsequential as to the thousands of other contributors and

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110/ Because the vast majority of its revenues are from international calling, iBasis qualifies under the Commission's Limited International Revenue Exception ("LIRE") so that it would contribute only on its domestic, interstate revenue. 47 C.F.R. § 54.706(c). Under section 54.706(c) of the Commission's rules, a provider of interstate and international telecommunications is not required to contribute based on its international telecommunications end-user revenues if its interstate end-user telecommunications revenues constitute less than 12 percent of its combined interstate and international end-user telecommunications revenues. Providers, such as iBasis, that are subject to the LIRE contribute to the USF based only on their interstate end user telecommunications revenues.

111/ http://www.usac.org/about/universal-service/fund-facts/fund-facts.aspx.

112/ *See*, Federal Universal Service Support Mechanisms Fund Size Projections for the Fourth Quarter 2006, available athttp://www.usac.org/about/governance/fcc-filings/2006/Q4/FCC%204Q2006%20Quarterly%20Demand%20Filing%20(6)%20(Final%208.1.06).pdf (filed August 2, 2006).

not even measurable for their millions and millions of customers. Of course, the stay would not eliminate their miniscule reduction, but potentially merely delay it.

The public interest also supports for a stay. For the reasons cited above, the public interest in ensuring a fully funded USF is not affected by a stay. On the other hand requiring payment in advance of a court decision on the merits will adversely affect iBasis and its ability to provide low-cost international calling to its prepaid calling card customers. Many of these customers have limited incomes and rely on iBasis cards, particularly for international calls. Any concern that the Commission may have of shoring up the USF and bringing certainty to the prepaid calling card market is fully addressed by the *Calling Card Order's* interim ruling imposing, *prospectively*, USF contribution requirements on all prepaid calling card providers.

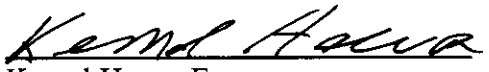
Finally, imposing retroactive liability here does not "level the playing field." To the contrary, iBasis and perhaps only a handful of other niche players, have been singled out for retroactive treatment. Major prepaid calling card providers such as AT&T, Inc. and Verizon do not provide IP-enabled cards, only menu driven calling cards, which the Commission has excused from retroactive liability.

**Conclusion**

For the foregoing reasons, iBasis, Inc. respectfully requests that the Commission stay that portion of the *Calling Card Order* that imposes retroactive liability on IP-Calling Card Providers, pending judicial review.

Respectfully submitted,
iBasis, Inc.,

By their attorneys:



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August 23, 2006

WDC 389338v.6

## CERTIFICATE OF SERVICE

I, Helen Gerostathos Guyton, hereby certify on this the 23RD day of August 2006, that I caused a true and correct copy of the foregoing "Petition For Stay Pending Judicial Review" to be served on the following as indicated below:

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Washington, DC 20554

**VIA ELECTRONIC DELIVERY**
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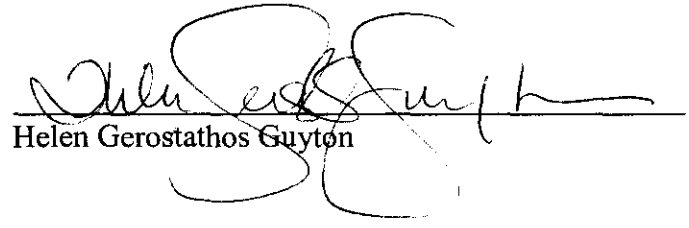


Helen Gerostathos Guyton

# EXHIBIT A

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | WC Docket No. 05-68 |
| Regulation of Prepaid Calling Card Services | ) | |

**DECLARATION OF JONATHAN D. DRALUCK**

1. My name is Jonathan D. Draluck. I am Vice-President of Business Affairs and General Counsel of iBasis, Inc. In that role, I oversee iBasis's legal and regulatory affairs. My business address is 20 Second Avenue, Burlington, MA 01803.

2. I make this declaration in support of iBasis's Petition For Stay Pending Judicial Review. In this declaration, I describe the immediate, severe and irreparable harm iBasis will suffer by the imposition of that portion of the *Calling Card Order* which imposes retroactive liability on service providers that offer prepaid calling card utilizing IP-transport functionalities. I describe the irreparable financial harm iBasis will suffer if it is required to make retroactive payment to the federal universal service fund ("USF") and other federal telecommunications related programs as required by the FCC's *Calling Card Order.* I also provide information on ways in which iBasis's services differ from those in the *AT&T IP-in-the-Middle Access Charge Order.*

3. By way of background, iBasis is a wholesale VoIP provider and is a provider of retail traditional and "virtual" prepaid calling cards that permit services over iBasis's IP-enabled platform. The company was launched in 1996 to tap into the ubiquity of the public Internet and harness the efficiency of packet routing to provide affordable, wholesale, international calling services. Its wholesale operations have grown substantially and now serve more than 400

carriers and provide call termination to over 100 countries. iBasis's retail service consists of prepaid calling cards and a "virtual" calling card service that is sold over the Internet.

4. iBasis owns no transmission facilities and is not a facilities based carrier. Its "network" consists of numerous gateways or computers that accept voice traffic, some originating on the PSTN and sent to iBasis in TDM format, some originating over broadband connections. For example, iBasis is a major wholesale provider for retail VoIP companies such as Skype and Yahoo!, which provide voice services to their customers with broadband connections. iBasis has over forty (40) such VoIP customers, and estimates that nearly 10% of traffic routed through its gateways originates and/or terminates over local broadband connections. In other words, it is not PSTN to PSTN traffic.

5. Once traffic reaches an iBasis gateway, iBasis converts it from TDM to IP packets, if necessary (the majority of traffic is already in IP format), and routes the packets over the public Internet to the appropriate iBasis terminating gateway iBasis performs a net protocol conversion for a significant percentage of traffic that it receives. That is, iBasis receives traffic in IP format and converts that traffic to TDM format before handing it off for termination.

6. From its inception, iBasis utilized the public Internet. It has deployed gateways and routers to provide, as a wholesale service, access to the public Internet for the transmission of voice traffic utilizing IP protocol.

7. In order to capitalize on its capacity, iBasis began providing prepaid calling cards in 2003. These cards are made available to the public through a number of small local retail outlets such as independent markets, convenience stores and gas stations. They enable calling card users to access, by dialing an 8YY or a local access number (which iBasis obtains from

telecommunications carriers), iBasis's Internet-based network for domestic and internationals calls at highly affordable rates.

8. Additionally, in September 2004, iBasis began offering a web-based "virtual" calling card service called Pingo™ that allows local access from 35 countries to purchase calling time over the iBasis network using a credit card or PayPal account, provides convenient features like auto-recharge when the balance reaches five dollars, and PIN-less dialing when calling from the phones the subscriber uses most often.

9. Unlike the AT&T service that was the subject of the *AT&T IP-in-the-Middle Access Charge Order*, whereby AT&T takes its own ordinary 1+ dialed long distance calls, converts them from TDM to IP in its network, transmits the calls from some unspecified distance over its own facilities, then converts the calls back to TDM in its network for termination on the PTSN, iBasis's services differ in several respects.

10. First, iBasis is not a facilities based carrier. Second, iBasis never sought to retrofit a service that was unquestionably a telecommunications service in order to receive the deregulatory benefits of information services classification. In fact, iBasis has benefited from the deregulatory environment and has passed those benefits onto consumers in the form of dramatically lower international calling rates. Third, as noted above, nearly 10% of the iBasis's overall traffic originates and/or terminates over a local broadband connection, and is thus not the type of PSTN to PSTN calling at issue in the *AT&T IP-in-the-Middle Access Charge Order.* Additionally, iBasis performs a net protocol conversion for a significant amount of the traffic it serves. The traffic at issue in the *AT&T IP-in-the-Middle Access Charge Order*, involved only traffic for which AT&T did not perform a net protocol conversion.

11. Nevertheless, beginning in 2005, and in an abundance of caution, iBasis voluntarily began to make USF contributions based on revenues derived from its Wholesale Business. As previously mentioned, iBasis's services can generally be broken down into two categories – wholesale and retail. The bulk of iBasis's business is its wholesale business, which is its global wholesale IP transport and termination business. iBasis's retail business is its IP-enabled prepaid calling card services business.

12. iBasis voluntarily made these USF payments even though iBasis continued to maintain that it was an information service provider, and as such was not obligated to pay into the USF. iBasis did so in the wake of the *AT&T IP-in-the-Middle Access Charge Order*, which signaled, but did not decide, that iBasis's Wholesale Business revenues were subject to USF contribution requirements.

13. Also at the beginning of 2005, iBasis determined that it was not obligated to pay into the USF on its retail prepaid calling card business' revenues, since the question of whether IP-enabled prepaid calling cards were subject to the USF was an open question of law, subject to a pending rulemaking proceeding. In making this determination, iBasis specifically relied on the language of the Order and Notice of Proposed Rulemaking in response to AT&T's Petition for Declaratory Ruling ("*EPCC Order and NPRM*").

14. The *EPCC Order and NPRM* asked the question of whether IP-enabled prepaid calling cards are Telecommunications Services subject to USF contributions, or Information Services which are not. Notably, the *EPCC Order and NPRM* asked whether the addition of menu-driven options, *i.e.* dialing options that enable prepaid calling card users to access sports, weather, stock quotes and the like by pressing certain phone digits, would change its classification analysis.

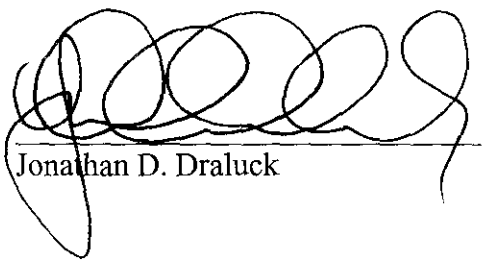
15. In view of this question, certain operations personnel at iBasis asked me whether iBasis should add menu-driven options to iBasis's retail business, which could be done with relative ease and little cost, to help insulate iBasis from liability. I specifically rejected that proposal since I did not want to engage in after the fact alterations in an attempt to further insulate our services, particularly since I already believed that our services were unregulated Information Services under the current state of the law. Furthermore, I believed that the addition of menu-driven options could not serve as a reasonable basis for drawing regulatory classification differentiations. As it turns out, under the *Calling Card Order*, this simple addition would have spared iBasis from retroactive liability.

16. Now that retroactive liability is being imposed, iBasis estimates that if the *Calling Card Order* is not stayed, it may have to make a USF contribution in excess of $2.5 million. The loss of $2.5 million would vitiate the company's profits for the last year. Moreover, iBasis has no means to recoup past contribution obligations from its customers.

17. Additionally, the *Calling Card Order* retroactively exposes iBasis's calling card service to the full panoply of federal regulation under Title II of the Communications Act, as well as to the potential for retroactive state licensing or related filing requirements for intrastate traffic, all during a time when iBasis reasonably treated its service as an unregulated information service. Among other effects, this retroactive telecommunications services designation exposes iBasis to the risk and attendant cost of litigation from local exchange carriers to collect interstate or intrastate access charges, as well as the cost of assessing and, as necessary, rectifying, compliance with state and federal rules and regulations applicable to intrastate or interstate telecommunications services over the past two plus years.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 23, 2006.



Jonathan D. Draluck